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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of

JOHN PATRICK FAY, also known as JOHN P. FAY,
Deceased,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO AFFIRM OR DISMISS

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellees, Florence Sylvia Wetherall Hunter, Kate Wetherall Spencer and Laurette Caillol, respectfully move this Court to affirm the judgment below,

of The Court of Appeals of the State of New York, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument; or in the alternative, to dismiss the appeal herein for lack of a substantial federal question.

Statement of Appellees' Position

The appellant attacks the facial constitutionality of Section 4-1.2 of the Estates, Powers and Trust Law of the State of New York (EPTL) which provides as follows:

> "§4-1.2 *Inheritance by or from illegitimate persons*
>
> "(a) For the purposes of this article:
>
> "(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> "(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> * * *
>
> "(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

In support of the contention that the statute is unconstitutional and to sustain jurisdiction on this appeal appellant cites *Trimble* v. *Gordon,* 430 U.S. 762; *Lalli* v. *Lalli,* 431 U.S. 911; *Pendleton* v. *Pendleton,* 431 U.S. 911; *Schanefelt* v. *Paradiso,* 431 U.S. 911 and *Reed* v. *Reed,* 404 U.S. 71.

It is appellees' position that the statutory omission of paternal kin as distributees of an illegitimate, at least where there has been no order of filiation, presents a situation substantially different from the questions and issues involved in the cited authorities, and that the statutory provision is, in the context of this appeal, well within the constitutional authority of the State Legislature.

Preliminary Statement

Appellant's "*Preface to Statement of the Case*" states that appellees could not deny decedent's paternity since the underpinnings to the establishment of their own relationship to him rest on his birth and baptismal records. Appellant has misapprehended the position of appellees. It is the position of appellees that the birth process itself supports the relationship of the mother as recorded in the near contemporaneous baptismal and birth certificates, but that the relationship of the father is, at best, only putatively indicated by those documents. It may be noted that appellant's own expert witness Philip Issac Caplan Q.C. testified on the evidential impact of the documents as follows:

> "Now I may say that that really represents the position equally to the evidential value of either an entry from a baptismal record or an entry from a civil register of births. In other words, each of these items would be accepted as evidence, but the weight that would be

given to them would depend on the total circumstances of the case. They would be accepted as evidence, but neither would be conclusive proof of the facts they purport to record." (R-A418)*

Statement of the Case

The decedent, John Fay, was born on April 20, 1892 in Edinburgh, Scotland. He was baptized there on May 1, 1892 (app. D and E, pp. D-1, E-1).** His birth was registered in Edinburgh on August 11, 1892.† The birth certificate is signed by one John Fay, as father and Elizabeth Hunter Wetherall, as mother (app. F, p. F-1).

Apart from the birth certificate, there is no other document subscribed by the putative father to support the claim of a father-child relationship.

The child was placed in a foster home shortly after his birth. He was never publicly acknowledged by his parents, and, in fact, his existence was a carefully kept secret.

Elizabeth Hunter Wetherall had been widowed in 1888. She had three sons of her marriage, whom she raised in Holywood, Ireland. The appellees are grandchildren of Elizabeth Hunter Wetherall, who together with her three sons, predeceased the decedent.

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* Reference is to the appendix in the Court of Appeals, State of New York.

** "app." references are to the appendices to the Jurisdictional Statement.

† The record discloses that as the birth registration was three months beyond the date of birth, under then applicable law the registration should have been on the authority of the Sheriff—a judicial officer—that formality was avoided by reflecting the birth date as May 20, 1892, a date within three month's of birth.

The putative father also lived in Holywood, Ireland. He was a widower in 1892, and in 1900 he married one Hattie Fradley. The appellant, Violet Buck, and a predeceased brother, John Gerald, were born of that marriage.

John Fay, the decedent, died an intestate domiciliary of New York, on August 18, 1970. The Surrogate's Court of New York County determined that his birth was illegitimate, that the appellees were his distributees and that Section 4-1.2 of the Estates Powers and Trust Law was constitutional. The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the decree of the Surrogate and on further appeal to the Court of Appeals there was a unanimous affirmance of the Courts below (app. A, pp. A-1 through A-7).

ARGUMENT

1. Reasons why the question presented is not substantial.

(a) A natural father's right in intestacy to share in the estate of an illegitimate child.

The appellant claims to be a sister of the half-blood of the decedent through a common father. On the basis of that claimed relationship, she seeks a benefit *from* the illegitimate's estate. As her claim is representative through her father, she must demonstrate that EPTL Section 4-1.2 is unconstitutional because it unreasonably restricts or limits inheritance by the father himself to those instances in which an order of filiation has been made. Only if she establishes the unconstitutionality of that provision do we reach the second question of whether the statute is constitutional in its denial to paternal kindred status as distributees, in the circumstance where (as is not the case here) an order of filiation has been entered.

The essential threshold question on this motion is whether the requirement of an order of filiation is within the constitutional authority of the State in the circumstance where the father of a deceased illegitimate, (or the appellant claiming through him), seeks a benefit *from* the estate of the illegitimate. There is no discrimination *against* the illegitimate involved and no deprivation of the rights of the illegitimate at issue. The question is simply and solely whether the state may constitutionally require that a claimant father should prove, in a particular way, his relationship to the child upon whom he has visited the status of illegitimacy.

Whatever the standard of scrutiny under the Equal Protection Clause, appropriate to the claims of illegitimate children, there does not appear to be any basis for departure from a "rational basis" or "minimal scrutiny" test in a claim that has nothing whatever to do with discrimination *against* an illegitimate. In fact, the requisite standard of proof of relationship of the father of an illegitimate, where a benefit is sought *from* the illegitimate's estate, should have little or nothing to do with the Equal Protection Clause which operates, in that context, essentially to prevent discrimination *against* an illegitimate child. The fact that the statute restricts inheritance by an illegitimate *from* a natural father or paternal kindred is not at issue on this appeal. There are no principles, either logical or sociological which decree reciprocity of inheritance rights, either as relates to inheritance by an illegitimate from a natural father or by a natural father from an illegitimate. As a matter of fact, no basis can be perceived why inheritance rights generally, should be governed by principles of reciprocity. Historically they never have been. By way of analogy, under Section 117 of the New York *Domestic Relations Law* (prior to its amendment in 1966), an adopted child enjoyed inheritance rights in intestacy from his natural parents. The natural parents did not enjoy such rights from the adopted child whose distributees were the child's foster parents.

Sections 83(14) and 83(8) of former New York *Decedent Estate Law* provided that an illegitimate child shared in his intestate mother's estate only if she was not survived by legitimate issue but the mother in contrast was an heir of the child without regard to any exception and even if she had other legitimate children.

It is axiomatic that a statute *shall* be presumed and determined to be constitutional if any state of facts may reasonably be conceived to justify it. *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *McDonald* v. *Board of Elections Commissioners,* 394 U.S. 802, 809 (1969).

With respect to the right of a natural father (or the right of one claiming through him) to benefit, in the estate administration process, the legislative requirement of proof as to entitlement through a Court order (however else the claimant may have declared his status) appears eminently reasonable to insure the orderly administration of estates and is in no sense an infringement of any constitutional right.

(b) The status of paternal kindred of an illegitimate child.

Section 4-1.2(b) provides that the natural father is a distributee of his illegitimate child only if there has been an order of filiation. There is no order of filiation here. However, even where an order of filiation has been made, paternal kindred are not included among the distributees of an intestate illegitimate child. As the Court of Appeals noted in the decision from which this appeal is taken, the statutory exclusion of paternal kindred is not directed at the illegitimate, nor is it a punishment for the parent's conduct. The individuals related to the decedent are not denied inheritance on the basis of their sex. Rather, the statute is designed to insure that only true members of an illegitimate's family share in the estate and it serves the State purpose of providing for the orderly settlement of estates.

The decision in *Matter of Flemm,* 85 Misc. 855 (1975), reviewed EPTL 4-1.2, its purpose, effect and legislative history, in some detail, from the vantage point (in the words of the Court) of "The experience of this the busiest Court in the State measured by the number of intestate estates which traffic daily through this Court." The opinion discusses the State's responsibility to provide for the orderly devolution of property and the substantial problems involved in notice to illegitimates in order that procedural due process and finality of decree and title to property might be achieved. At p. 859 the Court summed up those problems as follows:

> "The procedural problems, however, were of real concern to the experienced members of the commission. An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent. (SCPA 1003.) And, in probating the will of his parent (though not named a beneficiary) or in probating the will of any person who makes a class disposition to "issue" of such parent, the illegitimate must be served with process. (SCPA 1403). How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware? *And of greatest concern, how to achieve finality of decree in* **any** *estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries?* Finality in decree is essential in the Surrogate's Courts since title to real property passes under such decree. Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, *all* illegitimates must be served with process. This would

be no real problem with respect to those few estates where there are "known" illegitimates. But it presents an almost insuperable burden as regards "unknown" illegitimates. The point made in the commission discussions was that instead of affecting only a few estates, procedural problems would be created for many—some members suggested a majority—of estates." (Emphasis supplied.)

EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Rev. and Simplification of Laws of Estates, N.Y. Legis. Doc. 1965 No. 19, pp. (233-271)) (excerpted at app. G, pp. G-1 through G-6).

The Report discussed the problems relating to paternal kindred inheritance. In supplement to the State's purpose and obligation with respect to the orderly administration of estates, it was the perception of the New York Legislature that members of the mother's family will often have knowledge of the fact that she has given birth to an illegitimate child whereas, even in the circumstance where there is an order of filiation, the relatives of the father will have no such knowledge. In the words of the Commission, it was the legislative purpose, in the exclusion of paternal kindred, to avoid creation "by law [of] a family group that did not exist in reality."

(c) The impact of the decisions in *Trimble* v. *Gordon*, 430 U.S. 762 (1977) and *Matter of Lalli*, 43 N.Y. 2d 65, Jur. Not. 46 U.S.L.W. (1978) on the issues in this appeal.

This Court in *Trimble* v. *Gordon* considered and found unconstitutional former Section 12 of the Illinois Probate Act which, in pertinent part, precluded an illegitimate child from inheriting from an intestate father except in the circumstance where the parents intermarry and the child is acknowledged by the father as the father's child, in which event, the statute provided that the child should be considered as legitimate. In *Matter of Lalli* the New York Court of Appeals, on remand from this Court, adhered to its previous decision and found that the New York statute differed significantly from the Illinois statute and that the New York statute met the constitutional guidelines set forth in *Trimble* with respect to inheritance by an illegitimate.

Both the *Trimble* and the *Lalli* decisions refer to the obvious difficulty in the proof of paternity. *Trimble* held that difficulty of proof does not justify total exclusion of illegitimate children from the estates of their intestate fathers. *Matter of Lalli* held that the statutory form of proof required under the New York statute for an illegitimate child to inherit *from* his father was well within the standard articulated in *Trimble*. It is obvious, if *Lalli* is affirmed by this Court that the issues on this appeal present an *a fortiori* situation. Quite apart, however, from the authority of *Lalli*, the fact pattern and issues involved here are substantially different and the determination in *Trimble* does not afford a constitutional basis for this appeal.

In the *Trimble* decision, this Court noted that:

> "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."

It certainly follows that an even more demanding standard may be required of those claiming *from the illegitimate's* estate.

Again, in *Trimble*, where this Court had before it for review a situation involving penalization of the illegitimate child, the Court nonetheless went on to observe that:

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance."

We are left then on this appeal to consider, in the light of the principle that "courts should accord substantial deference to a State's statutory scheme of inheritance," whether the standard of an order of filiation is so overstringent as to present a Constitutional question in the situation where, as here, the father, or one claiming through him seeks a benefit *from* the illegitimate's estate.

In the opinion of the Supreme Court of Minnesota in *In re Estate of Peter Pakarinen,* 287 Minn. 330, 178 N.W. 2d 714 (1970) app. dsmsd. 402 U.S. 903 (1971) cited in appellant's Jurisdictional Statement, the Court, in distinguishing wrongful death and inheritance rights, stated:

> "While we unhesitatingly agree that such distinctions made solely on the basis of legitimacy are a denial of equal protection [none of] these decisions can be considered controlling authority for the proposition that it is constitutionally impermissible to require an illegitimate attempting to inherit from his putative father to produce virtually unassailable proof that the decedent is in fact his father for the distinct purpose of determining his rights of inheritance."

Trimble v. *Gordon* does not impinge on that principle. Nor can the *Trimble* decision be rationally stretched to the situation on this appeal. Here, in contrast, the obligation of proof by order is imposed, not on the illegitimate, but on the father, the very person who was capable of ordering events.*

Appellees submit that neither the overall decision of this Court in *Trimble* v. *Gordon* (whether liberally or narrowly read) nor any single specific pronouncement of the Court therein, is authority for the proposition that EPTL 4-1.2, in its provision relating to inheritance by paternal kindred, is unconstitutional.

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* It may be noted that the record below established that a judicial order of paternity was obtainable by registration of the birth on the authority of the Sheriff or through a proceeding in Declarator.

(d) Appellant, in her assertion of a substantial constitutional question on this appeal, does not meet the issues cogently stated by the Court of Appeals.

As stated by the Court of Appeals:

> "Appellant challenges, however, the facial constitutionality of the preclusion of inheritance by paternal kindred of an illegitimate, other than the father, irrespective of the existence of an order of filiation. Applying a less than strict scrutiny, but yet not a 'toothless' standard of review, *we hold that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection.*
>
> EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Revision and Simplification of Laws of Estates, N Y Legis. Doc. 1965, No. 19, pp. 233-271). It was the Commission's belief that the maternal kindred of an illegitimate child would often have knowledge of the child's birth whether or not an order of filiation was ever made. In contrast, the Commission believed that frequently the paternal kindred of an illegitimate may not have knowledge of the child's birth, notwithstanding the existence of an order of filiation. By excluding paternal kindred, other than the father, from a class of an illegitimate's distributees, the Commission sought to avoid creation 'by law [of] a family group that did not exist in reality.' (*Id.* at p. 266.)
>
> It should not be overlooked that this exclusion is not directed at the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate decedent denied inheritance on the basis of their sex. It is merely a legislative judgment designed to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate. In addition, it serves a legitimate purpose in providing for the orderly settlement of estates and dependability of title to property passing under our laws of intestate distribution. We thus find no constitutional infirmity in precluding inheritance by the paternal kindred of an illegitimate." (app. A, pp. A-6, A-7) emphasis supplied.

As the Court of Appeals noted, the statutory difference in the treatment of paternal kindred and maternal kindred in respect to a deceased illegitimate's estate does not arise from, or result in, an invidious gender-based discrimination. It is, in no sense, predicated on archaic presumptions of the superiority of one sex over another such as led to the determination of unconstitutionality in *Reed* v. *Reed*, 404 U.S. 71 (1974), which considered a statute that accorded male distributees priority over equally qualified females in appointment as administrators of a decedent's estate.

In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) this Court considered a statute that required widowers to show dependence upon their deceased wives for over one-half of their support in order that they might qualify for survivors' benefits under the Social Security Law. Widows on the other hand were entitled to those benefits irrespective of dependence on their deceased spouse. A closely divided court (5-4) found that disparate treatment to be unconstitutional. Justice Stevens, in his concurring opinion, reviewed the evolution of the statute in issue and made the following observation:

> "It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate

the terms 'widow' and 'dependent surviving spouse.' ...

"I am therefore persuaded that this discrimination against a group of males is merely the accidental by-product of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that 'due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification. (citation omitted)"

EPTL Section 4-1.2, in its exclusion of paternal kindred from distributee status in the estate of a deceased illegitimate, is the end result of specific "analysis" and "actual reflection," and of careful study, intensive, protracted and systematic. As clearly demonstrated by its legislative history, hereinabove discussed, the statute evolved and was enacted only after careful and deliberative consideration by the community through its duly constituted legislative process. Such legislative history, together with the authorities hereinabove discussed, establish that, central to the thrust of the statute, (and, indeed, the very heart and core of the legislation itself) was the expression of the legitimate interest of the community in the orderly devolution of estates.

The statute has no purpose or intent to, nor does it, *in effect*, discriminate against males. It merely recognizes the difficulties inherent in proof of male parentage and accordingly, effectuates the sound and legitimate purpose of avoiding the uncertainty, confusion and disorder which would ensue in the devolution of property by reason of the

pragmatic impossibility of establishing kinship through the male parent where participation in the illegitimate's estate is concerned. The result thus achieved avoids the impediment to the settlement of estates which would otherwise arise from "the possibility . . . of a secret illegitimate lurking in the buried past . . . ." Differentiation in gender treatment which results from a legitimate purpose is not unconstitutional. *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

Were this Court to countenance the appeal from the determination "that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection", it is difficult to assess how its decision so to do would redound to the advantage of an illegitimate child. On the other hand, such action might well enmesh this tribunal in a quagmire of local concerns involved in the devolution of property which this Court itself has characterized as "a matter particularly within the competence of the individual states."

Conclusion

The facts establish that the decedent was illegitimate. He was not only excluded from any familial relationship with his alleged father's family in his lifetime but his very existence was unknown to them. The statute contemplates just such situations when it bars intestate inheritance by the father himself, absent an order of filiation, and in its provision that paternal kindred shall not be included as distributees.

Appellant now seeks a benefit from the illegitimate's estate through nullification of the statute on alleged constitutional grounds. Her position does not in any way enhance the status of the illegitimate. It ignores the difficulties of proof inherent in the establishment of paternity as well as the State's right and obligation to provide for the orderly devolution of property and results in the creation by law of a family that never existed in fact.

The appeal should be dismissed.

Respectfully submitted,

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